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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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11 UNITED STATES OF AMERICA,
12 Plaintiff,

NO. CR. 03-95-WBS

13 v.

MEMORANDUM AND ORDER RE:
MOTION TO SUPPRESS FRUITS OF
ARREST

14 AMR MOHSEN and ALY MOHSEN,
15 Defendants.
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18 Defendant Amr Mohsen moves to suppress the fruits of
19 his arrest on March 27, 2004, on the ground that the arresting
20 agents did not have statutory authority to make the warrantless
21 arrest.

22 I. Background

23 The events of the underlying patent litigation that
24 resulted in perjury and obstruction of justice counts against
25 defendant are well known to the government and defendant. On
26 Thursday, March 25, 2004, the FBI placed defendant under
27 surveillance, and this surveillance did not end until
28 approximately 10:30 p.m. on March 27, 2004. (Moss Decl. ¶ 7).

1 During the morning of March 25, members of defendant's family
2 were seen moving items in front of their home for trash pick up.
3 (Id. ¶ 8). At approximately 9:00 p.m. on March 25, 2004, FBI
4 Special Agent Joel Moss saw defendant at the Egyptian Consulate
5 in San Francisco. (Id. ¶ 9). Defendant gained entry into the
6 consulate and was inside for five minutes. (Id. ¶ 9).

7 On March 26, 2004, Mohsen deposited and withdrew large
8 amounts of money from three banks. At approximately 2:30 p.m. on
9 March 26, defendant deposited two checks in the amounts of
10 \$30,000 and \$34,000 at a Bank of America branch in Santa Clara.
11 A bank employee at that branch told FBI agents that defendant
12 asked "how much can you give me in cash?" (Moss Decl. ¶ 10). A
13 bank teller at that branch overheard defendant using his cell
14 phone and mentioning that he had given his wife and son Power of
15 Attorney over his assets. (Id.). Approximately five minutes
16 after he left the Santa Clara branch of Bank of America, Mohsen
17 arrived at the Silicon Valley Bank. (Id.). There he deposited a
18 \$30,000 cashier's check and withdrew \$30,000 in cash. (Id.).
19 Defendant presents evidence, neither contained in the Weber
20 affidavit nor the Moss declaration, that "Mohsen did not appear
21 to be nervous to [Cherine] Drake," Operations Officer for the
22 Silicon Valley Bank, and that he did not have a problem with
23 filling out a Currency Transaction Report. (Def.'s Am. Reply to
24 Pl.'s Mem. in Opp'n to Def.'s Mot to Suppress Evidence Obtained
25 as a Result of the Arrest Ex. 1 (FBI Investigation Report of
26 Interview with Cherine Drake)). Approximately two hours after
27 leaving the Silicon Valley Bank, defendant drove to a Bank of
28 America branch in Sunnyvale. (Moss Decl. ¶ 10). There he

1 deposited a check drawn on the State Bank of Boston in the amount
2 of \$54,000 and asked for as much cash as possible. (Id.). He
3 withdrew \$10,000 and was told that the remainder of the deposited
4 funds would be available at midnight. (Id.).

5 The next day, March 27, at approximately noon,
6 defendant entered a branch of Bank of America in Los Gatos and
7 was observed receiving a stack of United States currency
8 approximately 1.5 inches thick. (Id.). About an hour and a half
9 later, defendant went to a hotel in Los Gatos and used a pay
10 telephone. (Id. ¶ 11). Defendant was overheard asking about a
11 flight and time. (Id.). Defendant was also overheard
12 rescheduling an appointment for later that afternoon. (Id. ¶
13 12).¹ At about 3:00 p.m., defendant was observed at a dentist's
14 office in Fremont. (Id.). An assistant at that office reported
15 that defendant told her that he was going to be out of town for
16 at least two months. (Id.). At 4:50 p.m. the same day, Special
17 Agent Moss overheard defendant on a public telephone say that he
18 was in the Bay Area and would be there for a few hours. (Id. ¶
19 13). At approximately 7:00 p.m., defendant was observed using a
20 pay telephone for about an hour and a half, during which time
21 defendant was overheard trying to book a charter flight from Fort
22 Lauderdale, Florida to the Cayman Islands. (Id.). Defendant was
23 also overheard mentioning that one person would be traveling on
24 an Egyptian passport. (Id.). Defendant was also overheard
25 successfully booking a flight from San Jose to Fort Lauderdale

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27 ¹ Hearsay may be used to establish probable cause, "so
28 long as the informant's statement is reasonably corroborated by
other matters within the officer's knowledge." Illinois v.
Gates, 462 U.S. 213, 242 (1983).

1 via Phoenix, departing San Jose at 9:00 a.m. the next day, March
2 28. (Id.).

3 Defendant was arrested at approximately 10:30 p.m. on
4 March 27, 2004. (Id. ¶ 15). Incident to arrest, FBI Special
5 Agent Bruce Whitten recovered approximately \$20,000 in \$100 bills
6 and an Egyptian passport, apparently issued by the Egyptian
7 Consulate in San Francisco on March 25, 2004, in the name of Dr.
8 Amr Mohamed Abdel-Latif Mohsen. (Id.).

9 II. Discussion

10 The question presented is whether law enforcement
11 agents had statutory authority to arrest defendant without a
12 warrant. Defendant argues that all fruits of the search of
13 defendant, including the fact that he possessed a passport and
14 \$20,000 in cash at the time of his arrest, as well as all
15 evidence found within the car that was seized pursuant to the
16 arrest, inventoried, and searched on March 30, 2004, must be
17 suppressed.

18 Because defendant was arrested by an FBI special agent
19 for either a violation of the terms of his release set by a
20 federal court or for contempt of that court, or both, federal
21 statutory law governs the warrantless arrest. United States v.
22 Gaines, 563 F.2d 1352, 1357 (9th Cir. 1977) ("Inasmuch as the
23 bank robbery violated federal law, the FBI officer was properly
24 the principal actor in the stop and the subsequent arrest.
25 Accordingly, both the stop and arrest are governed by federal
26 law" (citing 18 U.S.C. § 3052)). The government relies upon two
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1 separate statutes, 18 U.S.C. § 3052² and 18 U.S.C. § 3062³, and
2 only these statutes, to justify the arrest.

3 A. Arrest Not Warranted Under Section 3062

4 Section 3062 of Title 18 of the United States Code
5 permits a federal law enforcement officer to make a warrantless
6 arrest when he has reasonable grounds to believe that an accused
7 person is violating, in the officer's presence, certain
8 conditions of the accused's pretrial release imposed upon him by
9 a federal judicial officer. See 18 U.S.C. § 3062 (authorizing
10 warrantless arrest when accused is violating: "restrictions of
11 personal associations, place of abode, or travel"; restrictions
12 on "contact with an alleged victim of the crime and with a
13 potential witness who may testify concerning the offense";
14 restrictions of possession of "a firearm, destructive device, or
15 other dangerous weapon"; restrictions on "excessive use of

17 ² The Director, Associate Director, Assistant to the
18 Director, Assistant Directors, inspectors, and agents
19 of the Federal Bureau of Investigation of the
20 Department of Justice may carry firearms, serve
21 warrants and subpoenas issued under the authority of
22 the United States and make arrests without warrant for
23 any offense against the United States committed in
24 their presence, or for any felony cognizable under the
25 laws of the United States if they have reasonable
26 grounds to believe that the person to be arrested has
27 committed or is committing such felony.
28 18 U.S.C. § 3052.

24 ³ A law enforcement officer, who is authorized to arrest
25 for an offense committed in his presence, may arrest a
26 person who is released pursuant to to chapter 207 if
27 the officer has reasonable grounds to believe that the
28 person is violating, in his presence, a condition
imposed on the person pursuant to section
3142(c)(1)(B)(iv), (v), (viii), (ix), or (xiii)
18 U.S.C. § 3062 (emphasis added).

1 alcohol, or any use of a narcotic drug or other controlled
2 substance"; or a requirement that the accused "return to custody
3 for specified hours" after work or school).

4 Defendant and the government agree that the only
5 restrictions that could have provided grounds for the warrantless
6 arrest of defendant in this case were the following: (1)
7 "Defendant shall not travel outside the Northern District of
8 California"; and/or (2) "Defendant shall surrender all passports
9 and visas to the Court by 4-9-03 and shall not apply for any
10 passports or other travel documents." (See Moss Decl. Ex. 1
11 (Apr. 8, 2003 Conditions of Release and Appearance)).

12 Defendant argues that, since nobody saw him receive the
13 passport at the consulate that Thursday night, the government
14 agents were without authority to make a warrantless arrest
15 pursuant to § 3062. The government concedes that none of the
16 arresting officers witnessed defendant apply for a passport.
17 (See Moss Decl. ¶ 9) ("I believe that the Egyptian Consulate is a
18 place from which Mohsen could obtain an Egyptian passport.").

19 Defendant did not travel outside the Northern District
20 of California in the presence of the arresting officers, and
21 defendant did not apply for any passports or other travel
22 documents in the presence of the arresting officers. Therefore,
23 the arresting officers had no reasonable grounds to believe that
24 the defendant was violating the conditions of his supervised
25 release in their presence.

26 There were reasonable grounds to believe that defendant
27 was preparing to flee and intended to flee the jurisdiction of
28 the court. A rational argument could be made that every release

1 order contains an inherent prohibition against preparing to flee
2 with intent to flee. However, no appellate court to this court's
3 knowledge has so held. To the contrary, Congress apparently felt
4 the need to emphasize the court's obligation to be specific as to
5 what was forbidden in the release order. See 18 U.S.C. §
6 3142(h).⁴ Accordingly, because it was not specifically
7 proscribed by the release order, this court is led to conclude
8 that preparing to flee with intent to flee was not prohibited by
9 the order.

10 Therefore, the officers did not have authority to
11 arrest defendant pursuant to § 3062, since he was not violating
12 the release order in the presence of the agents.

13 B. Arrest Not Warranted Pursuant to § 3052

14 Section 3052 of Title 18 permits warrantless arrests
15 not only when an offense is being committed against the United
16 States in the presence of law enforcement agents but also when a
17 law enforcement agent has "reasonable grounds to believe that the
18 person to be arrested has committed or is committing [a] felony."
19 The government argues that there was reasonable cause to believe
20 defendant had committed a felony violation of 18 U.S.C. § 401⁵ by
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22 ⁴ In a release order . . . , the judicial officer
23 shall-include a written statement that sets forth all
24 the conditions to which the release is subject, in a
25 manner sufficiently clear and specific to serve as a
guide for the person's conduct (emphasis
added).

26 18 U.S.C. § 3142(h).

27 ⁵ A court of the United States shall have power to punish
28 by fine or imprisonment, at its discretion, such
contempt of its authority, and none other, as-

1 applying for a passport. The government does not argue that the
2 arresting agents had probable cause to believe that defendant had
3 committed or was committing any other felony.

4 Defendant argues that only the court may initiate a
5 prosecution for contempt under 18 U.S.C. § 3148(c) for a
6 violation of a condition of release, but that statute contains no
7 such limiting language. See 18 U.S.C. § 3148(c) ("The judicial
8 officer may commence a prosecution for contempt, under section
9 401 of this title, if the person has violated a condition of
10 release."). This argument is foreclosed by the case law. Either
11 a judicial officer or the government may initiate prosecution for
12 criminal contempt. Steinert v. United States Dist. Court for the
13 Dist. of Nev., 543 F.2d 69, 71 (9th Cir. 1976) ("[T]he usual
14 manner of proceeding in criminal contempt is by Rule 42(b) notice
15 [giving the court power to summarily punish a person who commits
16 contempt in the presence of the court], rather than by
17 indictment. But . . . the Supreme Court 'presumably approved
18 prosecution of criminal contempt by indictment.'" (citing United
19 States v. Leyva, 513 F.2d 774, 778 (5th Cir. 1975))). Thus, the
20 court proceeds to the question of whether the officers had
21 probable cause to believe that a felony had been or was currently
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23 (1) Misbehavior of any person in its presence or so
24 near thereto as to obstruct the administration of
justice;

25 (2) Misbehavior of any of its officers in their
26 official transactions;

27 (3) Disobedience or resistance to its lawful writ,
process, order, rule, decree, or command.

28 18 U.S.C. § 401.

1 being committed at the time of the arrest.

2 There is no general federal attempt statute. United
3 States v. Hopkins, 703 F.2d 1102, 1104 (9th Cir. 1983). "A
4 defendant can therefore only be found guilty of an attempt to
5 commit a federal offense if the statute defining the offense also
6 expressly proscribes an attempt." Id. Section 401 does not
7 expressly proscribe an attempt to commit contempt of court.
8 Thus, if defendant's actions observed by the agents do not
9 independently constitute a crime, the arrest was not warranted
10 pursuant to § 3052. Any attempt to commit contempt was not
11 sufficient. See § 3052 (not permitting arrest if there are
12 reasonable grounds to believe a person will commit a felony in
13 the future).

14 The government argues that there was reasonable cause
15 to believe defendant had committed a felony violation of 18
16 U.S.C. § 401 by applying for a passport. However, § 401 does not
17 state the circumstances under which contempt of court is to be
18 charged as a misdemeanor and the circumstances under which it is
19 to be charged as a felony.⁶ Unlike the vast majority of crimes
20 defined in Title 18, the definition of criminal contempt lists no
21 maximum penalty. See 18 U.S.C. § 401; Frank v. United States,
22 395 U.S. 147, 149 (1969) (Congress "has authorized courts to
23 impose penalties but has not placed any specific limits on their
24 discretion; it has not categorized contempts as 'serious' or
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26 ⁶ "The literature on contempt of court is unanimous on
27 one point: the law is a mess." Earl C. Dudley, Jr., *Getting*
28 *Beyond the Civil/Criminal Distinction: A New Approach to the*
Regulation of Indirect Contempts," 79 Va. L. Rev. 1025, 1025
(1993).

1 'petty'"); (see also July 27, 2004 Superseding Indictment,
2 Penalty Sheet Attachment for Defendant Aly Mohsen) (indicating
3 "no maximum penalty" for Count 20, contempt of court).

4 Without guidance from Congress, how is this court to
5 determine whether the defendant's conduct of applying for a
6 passport constituted a felony or a misdemeanor?⁷ "[I]n
7 prosecutions for criminal contempt . . ., the severity of the
8 penalty actually imposed is the best indication of the
9 seriousness of the particular offense." Frank, 395 U.S. at 149.
10 The law enforcement officers who arrested defendant had no way of
11 knowing whether this court would sentence defendant, if defendant
12 were convicted of a violation of § 401, to more than a year in
13 prison for that violation. Even were the court to look to the
14 sentencing guidelines for guidance on whether defendant's action
15 would more likely be a felony or a misdemeanor, no answer is to
16 be found there either. "Section 2J1.1 of the United States
17 Sentencing Guidelines (U.S.S.G.) governs sentencing for contempt
18 convictions under 18 U.S.C. § 401(3). Section 2J1.1 merely
19 states 'Apply § 2X5.1.' U.S.S.G. § 2X5.1 instructs the court to
20 apply 'the most analogous offense guideline.'" United States v.
21 Voss, 82 F.3d 1521, 1531 (10th Cir. 1996). Section 2X5.1 also
22 states that "If there is not a sufficiently analogous guideline,
23 the provisions of 18 U.S.C. § 3553(b) shall control . . ."

24 "Because misconduct constituting contempt varies
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26 ⁷ "Felony" and "misdemeanor" are no longer defined terms
27 within Title 18. See 18 U.S.C. § 1 (repealed); but see Fed. R.
28 Crim. P. 7 ("An offense (other than criminal contempt) must be
prosecuted by an indictment if it is punishable: (A) by death; or
(B) by imprisonment for more than one year.").

1 significantly and the nature of the contemptuous conduct, the
2 circumstances under which the contempt was committed, the effect
3 the misconduct had on the administration of justice, and the need
4 to vindicate the authority of the court are highly context-
5 dependent, the [Sentencing] Commission has not provided a
6 specific guideline for this offense." U.S.S.G. § 2J1.1,
7 Application Note 1. Thus, even during the era of mandatory
8 sentencing guidelines, both the Congress and the Sentencing
9 Commission gave individual judges discretion to formulate an
10 individualized sentence.

11 As the application note suggests, one of the primary
12 rationales for the criminalization of contempt is "to vindicate
13 the authority of the court." Id. For the executive branch in
14 this case to assume that the court would punish defendant by
15 imprisonment a term of more than one year for applying for a
16 passport would usurp the authority of the court, conferred upon
17 it by Congress and the Sentencing Commission, to make this
18 determination.⁸ It would be entirely inappropriate for the court
19 to pontificate ex ante about what the "analogous guideline" for
20 violating the court's order forbidding defendant from applying
21 for a passport would be.⁹ It is not at all clear that applying
22 for a passport warrants imprisonment for a term longer than
23 twelve months. Defendant could have abandoned his plan and

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25 ⁸ The government's position would permit federal agents
26 to arrest without a warrant any person who arguably had violated
any court order. For example, a litigant who did not file his
papers on time could be summarily arrested.

27 ⁹ Defendant also argues persuasively that an
28 interpretation of § 3052 that would permit officers to arrest for
any contempt of court would render § 3062 superfluous.

1 appeared at court as required, and it is not certain that the
2 mere application for a passport would have warranted a sentence
3 of over a year. Therefore, § 3052 did not permit defendant's
4 arrest.

5 C. Suppression of the Evidence is the Proper Remedy

6 Because the arrest was not permitted by § 3052 or §
7 3062,¹⁰ the fruits of that arrest must be suppressed. See U.S.
8 Const. amend. IV; United States v. Watson, 423 U.S. 408, 417
9 (1976) ("The usual rule is that a police officer may arrest
10 without warrant one believed by the officer upon reasonable cause
11 to have been guilty of a felony." (quotation marks and citation
12 omitted)); Davis v. Mississippi, 394 U.S. 721 (1969) (evidence
13 that is the product of an unlawful arrest must be suppressed).
14 In Henry v. United States, 361 U.S. 98 (1959), the Supreme Court
15 held that the conditions permitting a warrantless arrest under
16 Section 3052 were coterminous with the Constitutionality of that
17 warrantless arrest:

18 The statutory authority of FBI officers and agents to make
19 felony arrests without a warrant is restricted to offenses
20 committed "in their presence" or to instances where they
21 have "reasonable grounds to believe that the person to be
22 arrested has committed or is committing" a felony. The
23 statute states the constitutional standard.

24 361 U.S. 98, 100 (1959) (citation omitted). Section 3052 has not
25 been amended since Henry.¹¹

26 IT IS THEREFORE ORDERED that defendant's motion to
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28 ¹⁰ The government does not argue that any other statute
permitted the arrest.

¹¹ The effect of these findings on the subsequent search
of defendant's vehicle are addressed in another order.

1 suppress the fruits of the arrest be, and the same hereby is,
2 GRANTED.

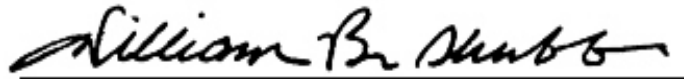
3 IT IS FURTHER ORDERED that the following items shall
4 not be received in evidence at trial:

5 (1) defendant's Egyptian passport;

6 (2) any contact information for Egyptian officials
7 found on Mohsen's person on March 27, 2004;

8 (3) evidence that \$20,000 in \$100 bills was found on
9 defendant's person on March 27, 2004.

10 DATED: October 24, 2005

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13 WILLIAM B. SHUBB
14 UNITED STATES DISTRICT JUDGE
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